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Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1893

In the Supreme Court of the United States

OCTOBER TERM, 1987

KELVIN W. DOUGLAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether an instruction permitting the court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense to petitioner.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 2a-7a) is reported at 22 M.J. 891.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987. The petition for a writ of certiorari was filed on May 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort McNair in Washington, D.C. Petitioner was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to a $400 fine, a reduction in rank, and a bad conduct discharge. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (& Supp. III) 860, and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-7a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. The charge against petitioner was the result of a urinalysis test conducted on April 30, 1985 (Tr. 145-150). Petitioner tested positive for tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana (GX 4). The test result, evidence regarding the chain of custody of all the urine samples, and expert testimony supporting the scientific reliability of the urinalysis test, were presented at trial (GXs 1-4; Tr. 145-150, 159-161, 164-168, 177-189). Petitioner's defense consisted of a claim that he had innocently ingested marijuana prior to the urinalysis test. He asserted that he had unknowingly ingested marijuana that had been baked into a chocolate cake which he consumed at a party several days before the urinalysis test (Tr. 289-305).[1]

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[1] Petitioner's defense was supported by testimony from the woman who allegedly baked the cake and from the woman who gave the party (Tr. 242-267). Petitioner also produced an expert to establish that ingesting marijuana in this manner could have caused a positive test result (Tr. 306). The court

2. At the close of the evidence, the trial judge advised the court-martial panel that in order to convict, the panel had to find that petitioner's use of the marijuana was wrongful. The judge then instructed the panel, without objection from petitioner, that the use of marijuana "may be inferred to be wrongful in absence of evidence to the contrary" but that the "drawing of this inference is not required" (Tr. 412). The court then continued as follows, discussing petitioner's defense of innocent use (Tr. 412-413):

> Now, there has been evidence introduced raising an issue whether the accused's use of marijuana was wrongful in light of the fact that he may have eaten a cake with marijuana in it without knowledge that there was marijuana in his cake. This raises the issue of innocent use. In determining this you must consider all relevant facts and circumstances including, but not limited to, the testimony of the witnesses concerning the baking of the cake, and the party, the opinion of Doctor Manders that the eating—eating marijuana in a cake could possibly result in a positive finding, the circumstances surrounding this eating, and it is certainly appropriate that you consider the lack of any specific government evidence regarding the circumstances of the use. Since their evidence in this case is solely on the use of urinalysis, you may find the accused guilty only if you are satisfied beyond a reasonable doubt that the accused's use of marijuana was not the result of the eating of the cake that

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of military review noted that in response to this evidence the prosecution "vigorously attack[ed] the credibility of the defense witnesses" through cross-examination (Pet. App. 4a). The court went on to highlight several inconsistencies in the defense witnesses' testimony that had been brought out during cross-examination (*ibid.*).

> contained marijuana without knowing of its content. Put another way, to be illegal and unlawful under Article 112a, the use of marijuana must be knowing and conscious[.] If the accused was, in fact, ignorant of the presence of marijuana in the cake that he ate then he cannot be found guilty. The accused's actual unawareness of the marijuana is a defense no matter how unreasonable his lack of knowledge may have been.

Thereafter, the trial judge repeatedly instructed the panel that the burden of proof regarding wrongfulness was on the prosecution (Tr. 413, 416):

> The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt—well, in order to find the accused guilty you must be satisfied beyond a reasonable doubt that the accused did not unknowingly eat marijuana in the cake. Now, put another way, if the evidence that he did eat marijuana without knowing what it was, if that raises a reasonable doubt then you must acquit the accused. * * *
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> * * * * *
>
> I'll mention again, in order to find the accused guilty you must find that he ingested marijuana, that he knew it was marijuana, that he knew it was marijuana if, in fact, he ever did ingest marijuana. This knowledge, like any other, may be proved by circumstantial evidence.

The only presumption the trial judge mentioned in the course of the instructions was that "the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt" (Tr. 418).

3. The Army Court of Military Review affirmed petitioner's conviction (Pet. App. 2a-7a). Petitioner challenged the constitutionality of the permissive inference of wrongful consumption that permits a court-martial panel to infer that the use of marijuana is wrongful in the absence of evidence to the contrary. The court of military review, however, found the inference to be constitutional, because the inference was a rational one and because it did not compel the finder to fact to find against petitioner or in any way shift the burden of proof to petitioner (Pet. App. 5a-6a).[2] The Court of Military Appeals summarily affirmed petitioner's conviction (*id.* at 1a).

ARGUMENT

Article 112a of the UCMJ, 10 U.S.C. (Supp. III) 912a, makes it a crime for a servicemember wrongfully to use marijuana. To establish a servicemember's guilt, the government must prove that a servicemember knowingly used marijuana without justification or authorization. *E.g.*, *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37b(2); *United States* v. *Ford*, 23 M.J. 331, 332-333 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157, 161-162 (C.M.A. 1986); *United States* v. *Grier*, 6 C.M.A. 218, 19 C.M.R. 344 (1955); *United States* v. *Greenwood*, 6 C.M.A. 209, 19 C.M.R. 335 (1955). The government may prove that a serviceman wrongfully

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[2] Article 66(c), UCMJ, 10 U.S.C. 866(c), authorizes courts of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." The Army Court of Military Review independently reviewed the sufficiency of the evidence against petitioner and concluded that he was guilty.

used marijuana by relying on the presence of the constituent elements of marijuana in a servicemember's blood or urine and expert testimony explaining any scientific evidence that is introduced at trial. *United States* v. *Ford*, 23 M.J. at 332-335; *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987). Once it establishes that the servicemember used marijuana, the government can carry its burden of showing wrongful use by relying on a permissive inference that a serviceman's use of contraband is wrongful. *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37c(5); *United States* v. *Ford*, 23 M.J. at 332-335; *United States* v. *Murphy*, 23 M.J. at 312; *United States* v. *Harper*, 22 M.J. at 162.[3]

The instructions given to petitioner's court-martial panel permitted the panel to infer that petitioner's use of marijuana was unlawful. Petitioner contends that the permissive inference violates the Due Process Clause, for several related reasons.[4] None of petitioner's claims has merit.

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[3] The *Manual* provides as follows, in pertinent part (Pt. IV, para. 37c(5)):

> Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be on the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

[4] Petitioner does not claim that the *Manual* provision is invalid on the ground that it requires the defendant to bear the burden of production on an element of the offense. Such a claim would lack merit in any event. As the Court of Military

1. Petitioner contends (Pet. 6-10) that the instructions shifted the burden of proof on wrongfulness from the government to him. Petitioner, however, did not object to the instructions. Accordingly, he can prevail on his claim only if he can establish that the instructions constituted plain error that produced a miscarriage of justice. See Rule for Courts-Martial 920(f), *Manual for Courts-Martial, United States, 1984*; *United States* v. *Fisher*, 21 M.J. 327 (C.M.A. 1986) (the standard of review for an instructional error raised for the first time on appeal is plain error). The instruction in this case did not constitute plain error; indeed, it was not erroneous at all.

The trial judge's instruction referred to a permissive inference, not to a mandatory presumption. The instruction was therefore materially different from the instruction given in *Francis* v. *Franklin*, 471 U.S. 307 (1985), on which petitioner relies. The instruction in *Francis* stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Id.* at 311. Those instructions

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Appeals explained in *United States* v. *Harper*, 22 M.J. at 162, the permissive inference authorized by the *Manual* only requires a defendant to come forward with some evidence that his use of marijuana was innocent. Shifting the burden of going forward to the defendant is not unconstitutional. *E.g.*, *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *Engle v. Isaac*, 456 U.S. 107, 120-121 & n.20 (1982); *Mullaney* v. *Wilbur*, 421 U.S. 684, 701-703 nn. 28, 30-31 (1975); *Barnes* v. *United States*, 412 U.S. 837, 846 n.11 (1973); *United States* v. *Harper*, 22 M.J. at 162.

created the risk that they could have been understood by the jury as a direction to presume an essential element of the charged offense. By contrast, the instruction given here told the court-martial panel only that it could infer that petitioner's use of marijuana was wrongful. An instruction permitting the trier of fact to infer an ultimate fact (such as wrongfulness) from a basic fact (such as use of marijuana) is ordinarily unobjectionable, since a permissive inference leaves the fact-finder free to credit or reject the suggested conclusion based on the evidence at trial. *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 10; *Francis* v. *Franklin*, 471 U.S. at 314-315; *Ulster County Court* v. *Allen*, 442 U.S. 140, 157-163 (1979). Because the trial judge in this case made it clear that the court-martial panel was not required to draw the inference,[5] the instruction created only a permissive inference and did not shift the burden of proof to petitioner. See *Ulster County Court*, 442 U.S. at 157; *United States* v. *Kimmel*, 777 F.2d 290 (5th Cir. 1985), cert. denied, 476 U.S. 1104 (1986); *United States* v. *Love*, 767 F.2d 1052, 1059-1060 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Johnson*, 756 F.2d 453, 454-455 (6th Cir. 1985).

The instruction was also not invalid on the ground that it encouraged the court-martial panel to draw an irrational connection between the use of marijuana and the wrongfulness of that use. A permissive inference can be challenged only if the inference is unjustified when the evidence is viewed in

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[5] The panel was repeatedly told that it must return a not guilty verdict if it believed that petitioner had innocently ingested marijuana (Tr. 411, 412, 413, 416).

light of reason and common sense. *Francis* v. *Franklin*, 471 U.S. at 314-315; *Ulster County Court*, 442 U.S. at 157-165. That is not the case here. As the Court of Military Appeals explained in *United States* v. *Ford*, 23 M.J. at 337, the inference is a rational one in the military setting, for several reasons. First, the possession or use of marijuana is a crime in the military community, and, unlike some jurisdictions in the civilian community, the military has not decriminalized the possession or use of marijuana in small amounts by servicemembers. Thus, to a serviceman marijuana is contraband, which reduces the likelihood that any particular use of marijuana will be innocent. Moreover, in recent years the military has greatly intensified and publicized its efforts to eliminate drug abuse by servicemen. That effort has given servicemembers notice to avoid any and all use of controlled substances, which further reduces the likelihood of an innocent use. In addition, the physiological effects of the use of marijuana alert a person to the presence of marijuana in his system and make it unlikely that he will be unable to account for its presence. Finally, "human experience in terms of self-preservation generally dictates that a person, whether a servicemember or not, generally knows what he consumes." *Ibid.* Taken together, these factors establish a logical connection between the predicate fact that a servicemember used marijuana and the ultimate fact that the use was wrongful. Since this conclusion is one that reason and common sense justify in the factual setting of this case, the instruction did not violate the Due Process Clause. See *Barnes* v. *United States*, 412 U.S. 837 (1973) (instruction that the jury can infer the defendant's

guilt from the unexplained possession of recently stolen property comports with due process).

2. Petitioner also contends (Pet. 8-9) that the military courts have misinterpreted the *Manual for Courts-Martial* by ruling that the trier of fact may infer that a serviceman's use of marijuana is wrongful even where a defendant has presented evidence to the contrary. Petitioner claims that the *Manual* does not allow this inference to be drawn when the defense has presented contrary evidence and that, in those cases, the *Manual* requires the government to offer direct proof that the defendant has wrongfully used marijuana.[6] That contention does not merit further review, for several reasons.

Petitioner's contention involves a narrow question of the proper construction of the *Manual for Courts-Martial* that has no application beyond the military justice system and that presents no conflict among the circuits. Moreover, the permissive inference about which petitioner complains has existed in military law for more than 35 years.[7] During that time, the Court of Military Appeals has interpreted the *Manual* to permit a court-martial panel to draw an inference of wrongful use in situations where a defendant offers some evidence that the use of contra-

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[6] Petitioner relies on that portion of the *Manual* (Pt. IV, para. 37c(5)), stating that "[p]ossession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary."

[7] See *Manual for Courts-Martial, United States—1951*, para. 138; *Manual for Courts-Martial, United States—1969 (rev. ed.)* para. 138a(2); *Manual for Courts-Martial, United States —1984* Pt. IV, para. 37c(5); *United States* v. *Ford*, 23 M.J. at 337.

band was innocent. *E.g.*, *United States* v. *Ford*, 23 M.J. at 334-337; see *United States* v. *West*, 15 C.M.A. 3, 34 C.M.R. 449 (1964). The interpretation of the *Manual for Courts-Martial* adopted by the military courts is entitled to considerable deference. *E.g.*, *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950). The Court of Military Appeals' construction of the *Manual* is also entirely consistent with this Court's decision in *Barnes* v. *United States*, 412 U.S. at 845 n.9, which recognized that a similar inference may be drawn even when the defendant presents contrary evidence.[8]

Finally, the Court of Military Appeals' interpretation of the *Manual* is correct. The background to and development of the current version of the *Manual* shows that the provision on which petitioner relies

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[8] As this Court explained in *Barnes* v. *United States*, 412 U.S. at 845 n.9: "Of course, the mere fact that there is some evidence tending to explain a defendant's possession [of stolen goods] consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.' * * * The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference."

Petitioner maintains (Pet. 7) that *Barnes* v. *United States* is inapposite for two reasons, but neither purported distinction has merit. Petitioner claims that this case is different because the contrary evidence consisted of incriminating testimony from a third party, rather than exculpatory testimony from the defendant. That distinction is immaterial, since the jury is entitled to disbelieve defense witnesses no less than the defendant himself. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). Petitioner's other proposed distinction —that the inference authorized by the *Manual* is limited to cases in which no contrary evidence appears—is wrong for the reasons given in the text below.

was designed to allow the government to rely on the inference unless the contrary evidence created a reasonable doubt as to guilt. *United States* v. *Ford*, 23 M.J. at 334. Read as a whole, the *Manual* allows the fact-finder to assess the relative merits of the evidence presented and independently to decide whether to draw the inference. *Id.* at 335. Petitioner's interpretation of the *Manual*, by contrast, would deprive the government of a reasonable inference whenever a defendant uttered a bare denial of wrongdoing; that result would greatly impair the government's ability to prosecute the use of contraband, which is often performed in secret. The military courts therefore properly rejected petitioner's theory.

3. Finally, petitioner contends (Pet. 10-13) that the inference of wrongfulness is fundamentally unfair and violates principles of due process for that reason. Petitioner's argument on that point reduces to the following proposition: The government's evidence was sufficient to establish that petitioner's use of marijuana was wrongful until petitioner introduced some contrary evidence that his use was innocent; at that point, the Due Process Clause required the government to introduce direct proof that petitioner's use was wrongful, and it prohibited the court-martial panel from relying on a belief that petitioner's witnesses lied as the basis for finding him guilty.

That proposition is fundamentally flawed. There is no rule of law that requires the government to offer independent evidence of wrongfulness after it has offered evidence that the defendant has used a controlled substance. That is, there is no constitutional principle that requires that a defendant be granted a directed verdict of acquittal if the government fails to offer independent evidence that the use of the con-

trolled substance is wrongful, once the government has established that the defendant used the substance. Nor is there any principle of fairness that requires the government to offer such independent evidence after the defendant has offered evidence that his use was not wrongful. Indeed, it has long been accepted that a finder of fact, in considering testimony offered for a particular purpose, can conclude that that testimony not only does not support the proposition for which it was offered, but in fact supports the opposite proposition.[9]

The instruction regarding the permissive inference of wrongfulness did no more than advise the court-martial panel that it was not required to credit petitioner's witnesses, and that it could find petitioner guilty if it was satisfied from all the evidence that the government had proved wrongful use of marijuana beyond a reasonable doubt. The trial judge made it clear that the burden remained on the prosecution to satisfy the court-martial panel that the defendant's use of marijuana was wrongful; the permissive inference instruction simply advised the panel that it could reach that conclusion without the

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[9] As Judge Learned Hand colorfully put it: "It is true that carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor'—is a part of the evidence. * * * This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *McDougall*, 201 F.2d 265, 268-269 (2d Cir. 1952) (footnote omitted).

need for evidence specifically directed to the issue of wrongfulness, and even in the face of defense evidence seeking to rebut the claim of wrongfulness.

Instructing the panel in that fashion is not unfair. It exposes a defendant to conviction for wrongful use of a controlled substance only if the court-martial panel is convinced, after considering all the evidence, that the use was in fact wrongful; thus, in cases such as this one, where the defendant puts on a defense of innocent use, the defendant can be convicted only if the court-martial panel finds beyond a reasonable doubt that that defense is false. Far from altering the burden of proof, the instruction given in this case simply reminded the court-martial panel that in reaching its verdict it was free to consider all the evidence and was not bound to accept any of it, even if particular evidence was not specifically rebutted by the opposing party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40452

